83-185

No. 81-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

PHYLLIS BAXTER, *et. al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a prior finding that any pattern or practice of employment discrimination was not "pervasive" precludes, as a matter of *res judicata*, all employees from litigating any individual claims of discrimination?

2. Did the Court of Appeals violate the principles of *Pullman-Standard Co. v. Swint*, 456 U.S. 273 (1982) when it held that the trial court's finding of intentional discrimination was "a statement of ultimate fact ... not a finding of fact reviewable under the 'clearly erroneous' rule"?

3. Does Rule 52, F.R.C.P., authorize the appellate courts to reconsider *de novo* or give little weight to the decision of a district court merely because the lower court based its findings of fact on pro-

posed findings submitted by counsel at the direction of the court?

PARTIES

The parties to this proceeding are Sylvia Cooper, Constance Russell, Helen Moore, Elmore Hannah, Jr., Phyllis Baxter, Brenda Gilliam, Glenda Knotts, Alfred Harrison, Sherri McCorkle, the Federal Reserve Bank of Richmond, and a class composed of all black persons who were employed at the Charlotte facilities of the Bank at any time between January 3, 1974, and September 8, 1980, who were subjected to employment discrimination on the basis of race. The Equal Employment Opportunity Commission was a party to the Cooper action in the courts below.

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Petitioners Sylvia Cooper, et al., and Phyllis Baxter, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth

Circuit entered in this proceeding on January 11, 1983. Civil actions commenced separately by petitioners Cooper and Baxter were consolidated in the court of appeals; a joint petition is being filed pursuant to Rule 19.4 of this Court.

OPINIONS BELOW

The decision of the court of appeals is reported at 698 F.2d 633, and is set out at pp. 2a- 185a of the Appendix. The order denying rehearing, which is not yet reported, is set out at p. 186a. The district court's Memorandum Decision of October 30, 1980, is not reported, and is set out at pp. 191a-96a. The district court's Findings of Fact and Conclusions of Law, which is not reported is set out at pp. 197a-285a. The district court orders of May 29, 1981, and February 26, 1982, which are not reported, are set forth at pp. 286a-88a and 290a-97a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1983. A timely Petition for Rehearing was filed, which was denied on April 6, 1983 by an equally divided court. (App. p. 186a) This Court granted an extension of time in which to file the Petition for Writ of Certiorari until August 4, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 52(a), Federal Rules of Civil Procedure, provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court

> shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

This petition involves two related proceedings which were consolidated in the court of appeals for argument and decision.

Cooper Plaintiffs: On March 22, 1977 the EEOC brought suit against the Federal Reserve Bank of Richmond alleging that the Bank had discriminated against black employees in making promotions at its Charlotte,

North Carolina facilities, and that it had discriminated in particular against Sylvia Cooper because of her race, first by refusing to promote her to a supervisory position and then by discharging her. Jurisdiction was asserted under 42 U.S.C. 2000e-5. On September 21, 1977, Cooper and three other present or former Bank employees (the "Cooper plaintiffs") were permitted to intervene as plaintiffs. On April 28, 1978, the district court certified a plaintiff class consisting of blacks who had been employed at the Bank's Charlotte branch since January 3, 1974, and had been discrimminated against on the basis of race.

The case was tried without a jury in September, 1980. On October 30, 1980, the district court issued a Memorandum of Decision which held that the Bank had discriminated against Cooper and another

intervenor, but concluding that no such discrimination had been shown regarding the other two intervenors. The trial court also concluded that the Bank had engaged in a pattern and practice of discrimination in denying promotions to black employees in pay grades 4 and 5.

The district court directed counsel for the plaintiffs to propose more detailed "findings of fact and conclusions of law consistent with [its] findings." 194a. The plaintiff submitted the requested proposed findings, and the defendant responded with comments and objections of its own. On May 29, 1981, the district court issued proposed findings substantially similar to those urged by plaintiff. 197a-285a.

On appeal the Fourth Circuit held that the finding of discrimination contained in the district court's October 30, 1980 Memorandum was "a statement of ultimate

fact ... not ... reviewable under the 'clearly erroneous' rule." 15a. The court of appeals ruled that the more detailed findings issued by the district court were to be subject to a special "careful scrutiny" (23a) because based on findings proposed by counsel, a practice the appellate court expressly disapproved. 16a. The court of appeals then undertook an exhaustive 25,000 word re-examination of the evidence considered by the trial judge, and reversed each of his findings of discrimination. Petitioners sought rehearing en banc in the Fourth Circuit, urging inter alia that the panel's decision exceeded the bounds of appellate review permitted by Rule 52(a), Federal Rules of Civil Procedure, and by this Court's decision in Pullman-Standard Co. v. Swint, 456 U.S. 273 (1982). Rehearing en banc was denied by an equally divided court, judges Winter,

Phillips, Murnaghan and Sprouse all having voted to reconsider the panel decision.

Baxter Plaintiffs

At the trial of the Cooper class action the plaintiffs presented testimony from a number of class member witnesses, including Phyllis Baxter, Brenda Gilliam, Glenda Knott and Sherri McCorkle (the "Baxter plaintiffs"), all of whom held job grades 6 or above. The Bank successfully argued that the district court should receive the class members' testimony only as it related to the pattern and practice allegation, and that the court should not pass on the merits of these witnesses' individual claims. The trial court ruled that the individual claims of the Baxter plaintiffs would not be heard, and that the Court would not consider their testimony except insofar as it tended to

establish the existence of a class-wide pattern and practice of discrimination.

After trial, the district court issued a Memorandum of Decision in the Cooper litigation holding that the class had demonstrated a discriminatory pattern of promotions out of grades 4 and 5. However, with respect to promotions out of grades 6 and above, the Court held:

> There does not appear to be a pattern and practice pervasive enough for the court to order relief. 194a. (emphasis added)

The trial court did not, however, rule that there had been no discrimination in grades 6 and above.

Shortly after receiving the trial court's Memorandum in Cooper, the Baxter plaintiffs sought to intervene in that action. Again, as it had done during trial, defendant's counsel opposed hearing the individual claims of the Baxter plain-

tiffs in the context of the Cooper action. In its memorandum in opposition to the motion to intervene, the defendant assured the district court that denying intervention would not preclude a separate subsequent action by the Baxter plaintiffs:

> "There is no way there will be any prejudice to applicants in denying their motion [to intervene], since they can pursue any individual claims they have in separate proceedings." (Defendant's Response to Motion to Intervene, p. 4.)

The district court denied the Baxter plaintiffs' Motion to Intervene in EEOC v.Cooper on the very basis advanced by the defendants, explaining:

> I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a §1981 suit next week, or why they could not file a claim with EEOC next week .... All motions for leave to intervene are thus denied without prejudice to any underlying rights the intervenors may have. 288a.

The Baxter plaintiffs promptly filed a separate proceeding, styled Baxter, et al. v. Federal Reserve Bank. Their Complaint alleged that each had been discriminated against in certain respects on an individual basis. The Baxter plaintiffs did not claim that the defendant had engaged in a pattern of discrimination against a class of black employees. The defendant moved to dismiss that new action, contending that the Cooper decision barred it as a matter of res judicata. The district court denied the motion to dismiss, but certified the question to the court of appeals (291a), which reversed. 172a-85a. Upon consideration of the Baxter plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc, the Panel's decision was upheld by an equally divided (4-4) Court. 188a.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Resolve A Conflict Among the Courts of Appeals Regarding Whether A Finding of No Pervasive Pattern and Practice of Discrimination Bars All Individual Claims of Discrimination Because of Res Judicata

The Fourth Circuit's decision that the rejection of a class-wide pattern and practice discrimination claim bars all individual discrimination claims is squarely in conflict with what has hitherto been the uniform view of the other courts of appeals which have considered this issue. In Dickerson v. United States Steel, 582 F.2d 827 (3d Cir. 1978), the Third Circuit rejected the identical argument made by the Bank in this case:

> The Company contends that, as a threshold matter, the district court's dismissal of a class-wide claim bars individual lawsuits under that claim by class member witnesses .... The class claims were not examined as a mere aggregation of individual claims, as the Company's argument suggests. Rather, the district court looked to

> statistical evidence offered to support the existence of a practice or pattern of discrimination .... The district court's finding of an absence of class-wide discrimination is not necessarily inconsistent with a claim that discrete, isolated instances of discrimination occurred, for which the statis tical evidence of a pattern of discrimination may have been lacking; there may have been sufficient evidence to establish a prima facie case of discrimination directed against specific employees. Therefore, the court's decision as to class-wide claims of discrimination does not, as a matter of res judicata, bar class members from asserting individual claims of personal discrimination.

582 F.2d at 830-31.

In Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), the Fifth Circuit held that an individual prison inmate who had testified during an earlier class action regarding prison conditions could still litigate the defendant's particular treatment of him, and was not barred by that earlier prison-wide class action. The court of appeals emphasized that the prior litiga-

tion had not specifically adjudicated Bogard's personal claim, and expressed doubts as to whether the district court would have been willing to resolve such individual questions in the context of the class litigation. 586 F.2d at 409. In Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979), the plaintiffs in a class action had sought individual relief for only certain members of the class. The Eighth Circuit held that relief for other individuals could not be obtained on appeal, but stressed

> Our determination is "without prejudice" to the right of the other members of this class ... to initiate a new action if they see fit. .... [C]lass members whose claims were not actually litigated should not be estopped by res judicata.

602 F.2d at 1282.

Recently, the Eleventh Circuit reached a result inherently inconsistent with the Fourth Circuit's holding. In Eastland

v. T.V.A., ____ F.2d ____ (11th Cir. 1983), the court affirmed the district court's determination that there was no class discrimination, but reversed its finding of no discrimination against certain class members. That decision conflicts squarely with the Fourth Circuit's holding that a finding of no class discrimination disposes of all individual claims as well.

The decision of the Fourth Circuit conflicts as well with the decisions of this Court. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) makes clear that the absence of a general policy of discrimination "cannot immunize an employer for liability for specific acts of discrimination." 438 U.S. at 579. It emphasized that the existence of a racially balanced workforce, while relevant to a claim that a particular employment action was racially motivated, could not "conclu-

sively demonstrate" the absence of such a motive. 438 U.S. at 580 (emphasis added). See also Connecticut v. Teal, ____ U.S. ____, 73 L.Ed. 2d 130, 142 (1982). Conversely, the decisions of this Court in Teamsters v. United States, 431 U.S. 324 (1977), and Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), establish that a finding of class-wide discrimination does not constitute a final adjudication of the claims of individual class members. In such a case, the employer, while bound by the finding of a pattern of discrimination, still is entitled to an opportunity to prove that particular employment decisions were made free of discriminatory intent.

If a finding regarding the existence of a class-wide pattern and practice of discrimination is conclusive of all individual claims of class members, individual class members would have no choice but to

intervene en masse prior to trial in order to protect those individual claims. Were that to occur, Rule 23 class actions would become an irresistible invitation for the joinder of claims which, by definition, are "so numerous that joinder ... is impracticable." Rule 23(a), Federal Rules of Civil Procedure. Such a rule would be equally burdensome on defendants, which would be required in response to proof of a class-wide pattern of discrimination to offer individualized defenses to the potential claims of each and every class member. The district courts would no longer be able to use the bifurcated trial procedure which was expressly sanctioned by Teamsters and Franks and which the lower court have found eminently practical and expeditious; individual and class claims would have to be tried together.

This is not a case in which the individual claims of the Baxter plaintiffs either were or even could have been adjudicated in the class action litigation. The district judge did not find there had never been any discrimination in any promotions above pay grade 6, but only that there was not proof that such discrimination was sufficiently "pervasive" to warrant a class-wide remedy. 194a. No objection is made that the Baxter plaintiffs failed to seek resolution of their claims in the Cooper litigation; on the contrary, they tried to do precisely that. The decision of the Fourth Circuit both required the Baxter plaintiffs to pursue their claims in the class litigation, and upheld a district court order forbidding them from doing so. Administered in this way Rule 23 would serve as a snare for the diligent as well as the unwary.

II. Certiorari Should Be Granted To Resolve A Conflict Among the Courts of Appeals Regarding the Use of Proposed Findings Prepared By Counsel for the Parties

Rule 52(a) requires the United States District Courts, in all cases tried without a jury, to "find the facts specially and state separately their conclusions of law thereon." Since the original promulgation of this Rule, there has been a widespread practice among district judges of asking for and relying on proposed findings of fact and conclusions of law drafted by counsel.[1/] In some instances trial judges solicit such findings prior to deciding the case; in other instances they are sought only after the judge has indicated how he or she intends to rule on the controversy at issue.

1/ See, e.g., Saco-Lowell Shops v. Reynolds, 141 F.2d 587, 589 (4th Cir. 1944).

The appellate courts are increasingly divided over whether the use or adoption of such proposed findings is always or ever permissible, and those circuits which disapprove this practice are in disagreement as to how such findings should be dealt with on appeal. These divisions are especially sharp over the district court practice, followed in this case, of asking the prevailing party to draft proposed findings consistent with the trial judge's announced decision in its favor.

The procedure utilized by the trial judge in this case is expressly sanctioned in the Sixth, Seventh and District of Columbia Circuits. The court of appeals for the District of Columbia most recently rejected an attack on this practice in Halkin v. Helms, 598 F.2d 1, 8 (D.C.Cir.

1978). That circuit court defended the practice at length in Schilling v. Schwitzer-Cummins Co., 142 F.2d 82 (D.C. Cir. 1944):

> Whatever may be the most commendable method of preparing findings -- whether by a judge alone, or with the assistance of his ... law clerk ... or from a draft submitted by counsel -- may well depend upon the case, the judge, and facilities available to him. If inadequate findings result from improper reliance upon drafts prepared by counsel -- or from any other case -- it is the result and not the source that is objectionable. 142 F.2d at 83 (footnotes omitted)

In Hill & Range Songs, Inc. v. Fred Rose Music, Inc., 570 F.2d 554 (6th Cir. 1978), the Sixth Circuit noted that it was "not unusual" for a court "to adopt verbatim" proposed findings of fact and conclusions of law, and held that so long as those findings and conclusions are supported by the record "it makes no real difference which counsel submitted them." 580 F.2d at 558. See also O'Leary v. Liggett Drug

Co., 150 F.2d 656, 667 (6th Cir. 1946) ("findings of fact, prepared and submitted by the successful attorneys, [which] have been adopted by the trial court ... are entitled to the same respect as if the judge, himself, had drafted them"). The Seventh Circuit upheld the practice in Schwerman Trucking Co. v. Gartland Steamship Co., 496 F.2d 466, 475 (8th Cir. 1974), explaining:

> By having the prevailing party submit proposed findings of fact and conclusions of law, the judge followed a practical and wise custom in which the prevailing party has "an obligation to a busy court to assist it in performance of its duty" under Rule 52(a).

See also Scheller-Globe Corp. v. Milsco Mfg. Co., 636 F.2d 177, 178 (7th Cir. 1980) ("This circuit ... leaves the matter within the trial court's discretion and recognizes that the procedure can be of considerable assistance to a trial court ...."); Missi-

ssippi Valley Barge Line Co. v. Cooper Terminal Co., 217 F.2d 321, 323 (7th Cir. 1954) ("It was perfectly proper to ask counsel for the successful party to perform the task of drafting the findings ....")

But this use of findings prepared by the prevailing party, a procedure described by the Seventh Circuit as of "considerable assistance" to the trial courts, has been specifically disapproved, although in varying degrees, by the Third,[2/] Fifth,[3/] Eighth,[4/] and Tenth[5/] circuits. On the other

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2/ Schlensky v. Dorsey, 574 F.2d 131, 148-49 (3d Cir. 1978); Roberts v. Ross, 344 F.2d 747, 751-53 (3d Cir. 1965).

3/ Amstar Corporation v. Domino's Pizza, Inc., 615 F.2d 552, 258 (5th Cir. 1980).

4/ Askew v. United States, 680 F.2d 1206, 1207-08 (8th Cir. 1982); Bradley v. Maryland Casualty Co., 382 F.2d 415, 422-23 (8th Cir. 1967).

5/ Kelson v. United States, 503 F.2d 1291, 1294 (10th Cir. 1974).

hand, the Third[6/] and Eighth[7/] circuits do approve the use of findings drafted by counsel if the trial court solicits and considers such proposed findings from both sides prior to its decision on the merits. In Roberts v. Ross, 344 F.2d 747, 752 (3d Cir. 1965), the Third Circuit noted:

> In most cases it will appear that many of the findings proposed by one or the other of the parties are fully supported by the evidence, are directed to material matters and may be adopted verbatim and it may even be that in some cases the findings and conclusions proposed by a party will be so carefully and objectively prepared that they may all properly be adopted by the trial judge without change.

But the verbatim adoption of proposed findings, sanctioned in appropriate cases by these two circuits, is "roundly con-

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6/ Schlensky v. Dorsey, 574 F.2d at 148-49; Roberts v. Ross, 344 F.2d at 752-53.

7/ Bradley v. Maryland Casualty Co., 382 F.2d at 423.

demned" by the Second Circuit[8/] and approved only in "highly technical" cases in the First[9/] and Ninth[10/] Circuits. The most recent Tenth Circuit opinion on this subject states both that the verbatim adoption of proposed findings "may be acceptable under some circumstances" and that it "is an abandonment of the duty imposed on trial judges by Rule 52."[11/]

Consistent with this inter-circuit conflict, the Fourth Circuit's position on

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8/ International Controls Corp. v. Vesco, 490 F.2d 1334, 1341 n. 6 (2d Cir. 1974).

9/ In Re Las Colinas, Inc., 426 F.2d 1005, 1009 (1st Cir. 1970) ("[T]he practice of adopting proposed findings verbatim should be limited to extraordinary cases when the subject matter is of a highly technical nature requiring expertise which the court does not possess.")

10/ Continuous Curve Contact Lenses v. Rynco Scientific Corp., 680 F.2d 605, 607 (9th Cir. 1982).

11/ Ramey Construction Co. v. Apache Tribe, 616 F.2d 464, 466 (10th Cir. 1980).

the use of proposed findings has undergone a complete reversal in recent years. Saco-Lowell Shops v. Reynolds, 141 F.2d 587, 589 (4th Cir. 1944), held that findings of fact "are not weakened or discredited because made by the trial judge in the form requested by counsel." In The Severance, 152 F.2d 916 (4th Cir. 1945), the trial judge had requested the prevailing party to draft proposed findings of fact and conclusions of law, and had adopted them "practically in toto"; the court of appeals held that "[t]his practice is not to be condemned." 152 F.2d at 918. Chicopee Manufacturing Corp. v. Kendall Co., 288 F.2d 719, 724-25 (4th Cir. 1961), citing decisions in the Sixth and District of Columbia circuits, noted there was authority for "the adoption of such ... proposed findings and conclusions as the

judge may find to be proper," and condemned only the ex parte drafting of an opinion by counsel for one of the parties. In White v. Carolina Paperboard Corp., 564 F.2d 1073 (4th Cir. 1977), the court of appeals, although criticizing the content of particular findings adopted from the proposals of counsel, expressed no per se disapproval of the use of such findings, and merely concluded that" [o]n remand, we suggest the district court prepare its own opinion." 564 F.2d at 1082-83. (Emphasis added) In July, 1982, the Fourth Circuit "cautioned against" the adoption of findings solicited by the trial judge from the prevailing party. Holsey v. Armour, 683 F.2d 864, 866 (4th Cir. 1982). Not until the decision below did that "caution" evolve into "disapproval." 16a. Two months after the decision in the instant case, the Fourth Circuit announced that it

had "previously condemned" this practice, inexplicably citing The Severance, which, as we noted above, had held precisely the opposite. Cuthbertson v. Biggers Brothers, Inc., (Slip opinion, March 9, 1983, pp. 8-9).

Those courts of appeals which do disapprove the adoption of findings prepared by counsel are themselves in disagreement about how such findings should be treated on appeal. No court regards that practice as reversible error. In at least some circumstances the First[12/] and Tenth[13/] circuits will remand a case for additional findings drafted by the trial court itself. The Eighth circuit applies the same "not clearly erroneous" rule

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12/ In re Las Colinas, Inc., 426 F.2d 1005, 1010 (1st Cir. 1970).

13/ Ramey Construction Co. v. Apache Tribe, 616 F.2d 464, 467-69 (10th Cir. 1980).

regardless whether the findings appealed from were drafted by counsel or the trial judge.[14/] Five circuits apply a special standard of review when considering findings of fact adopted by the trial court from proposals submitted by counsel. The First Circuit conducts a "most searching examination for error" in such cases.[15/] In the Third Circuit findings drafted by counsel are "looked at ... more narrowly and given less weight on review."[16/] The Fifth Circuit will "take into account" the origin of such findings,[17/] while the Ninth Circuit subjects them to "special

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14/ Askew v. United States, 680 F.2d 1206, 1208 (8th Cir. 1982).

15/ In re Las Colinas, Inc., 426 F.2d 1005, 1010 (1st Cir. 1970).

16/ Roberts v. Ross, 344 F.2d 747, 752 (3d Cir. 1965).

17/ Amstar Corporation v. Domino's Pizza Inc., 615 F.2d 252, 258 (5th Cir. 1980).

scrutiny."[18/] The Fourth Circuit decision in the instant case refers to several of these apparently divergent standards without indicating which was being adopted. 23a-24a.

The standard of review actually applied by the court of appeals in this case was for all practical purposes a de novo determination of the controversy. The Fourth Circuit's 25,000 word opinion is more than three times as long as the trial judge's 38 page Findings of Fact and Conclusions of Law. Virtually every finding of fact made by the trial court on an issue controverted by the defendants was decided afresh, and in favor of defendants, on appeal. The appellate court's discussion of the minute details of the conflicting

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18/ Continuous Curve Contact Lenses, Inc. v. Rynco Scientific Corporation, 680 F.2d 605, 607 (9th Cir. 1982).

evidence reflects, not an effort to determine whether the lower court's findings were supported by substantial evidence, but an effort, in the words of the Fourth Circuit, to determine what result would "reflect the truth and the right of the case." 24a.

The Fourth Circuit's treatment of petitioner Cooper's claim of discrimination in promotion is typical of its approach. There was conflicting testimony regarding whether the promotion at issue in her case was to the position of "utility supervisor" or "reader sorter supervisor." The trial court, expressly relying on the demeanor of the witnesses, held that the position was that of a utility supervisor. 220a, 266a-267a. The court of appeals, after reviewing the same evidence, reached the opposite conclusion. 155a-158a. The district court found that Cooper was qualified to supervise operation of the

reader-sorter machine. 266a. The court of appeals found she was not. 161a. The district court concluded that Cooper was more qualified for the promotion than the white employee who received it, 220a; the court of appeals concluded that she was not. 166a. The district court held that the reasons given by defendant for promoting a less experienced white in place of Cooper were "pretextual," noting that the defendant had ignored its own procedures in refusing to even consider Cooper for the promotion, 265a-66a; the court of appeals accepted without question the defendant's account of the "qualifications" for the job at issue. 163a.

The court of appeal's rejection of the claim of class wide discrimination demonstrates the dangers of such de novo appellate review. Where, as here, there is a complex trial involving technical

issues, and thousands of pages of exhibits and documents, an appellate court which attempts to decide afresh all the questions at issue is virtually certain to misunderstand or overlook relevant evidence. The trial court in this case found there was a pattern and practice of discrimination in promoting employees from grades 4 and 5, noting that blacks remained in these low paid entry level positions longer than did whites. Between 1966 and 1977, for example, white employees in grade 4 received promotions after an average of 652 days, while black employees waited an average of 982 days. 241a. The court of appeals reversed on the assumption that these differences were the result of black employees being assigned to service and cafeteria jobs rather than to clerical positions. 105a-106a.

The court of appeals believed "it was reasonable to expect" a substantial portion of black hirees would be assigned to service and cafeteria work. 105a. But the district court found that over a ten year period only 3 blacks expressing no job preference had been assigned to cleaning jobs. 243a. The court of appeals felt it was "to be expected" that there would be few promotion opportunities in service and cafeteria jobs. 106a. But the defendant only claimed that 13 of the 68 blacks in those departments had no promotional opportunities.[19/] The court of appeals rejected an analysis of promotion rates because it did not include employees who had resigned or been fired after receiving a promotion, 57a-62a; but in fact the exclusion of those employees

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19/ Appendix, No. 81-1536, 4th Cir., p. 1117.

simply had no effect on the pattern of disparities revealed by that analysis.[20/]

The Fourth Circuit's elaborate discussion of statistical methodology reflects a similar approach. The defendants on appeal criticized plaintiffs' expert for using a "one-tail" rather than a "two-tail" analysis of certain statistics. The Fourth Circuit noted that "after all the technical statistical jargon like 'one tail' and 'two-tail' ... were placed before the judge, it was his job to resolve the issues." 243a, n. 16. And then, having noted that this was a question for the trial court, the court of appeals proceeded to hold that the use of a "one-tail" test was improper. 83a-110a. Similarly, the court of appeals insisted that the proper

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20/ Petition for Rehearing and Suggestion for Rehearing En Banc, No. 81-1536, 4th Cir., pp. 9-12.

manner for calculating standard deviations was the binomial distribution formula, criticizing the trial judge for having "accepted without question" a calculation using the hypergeometric distribution formula. 62a. In fact, however, the trial judge had never questioned use of the hypergeometric method because the defendants had never objected to it at trial, or raised the issue on appeal, circumstances that would ordinarily have precluded an appellate court from even considering the issue.

As the very length and detail of the Fourth Circuit opinion make clear, the widespread differences regarding the use of findings prepared by counsel raises equally serious issues regarding the roles of the appellate courts. The independent factfinding apparent on the face of the Fourth Circuit's opinion would not have occurred in the three circuits which

approve use of such findings, or in the Eighth Circuit which applies to them the usual "not clearly erroneous" rule.

This division among the lower courts stems in part from this Court's past ambivalent attitude towards findings prepared by counsel. United States v. Crescent Amusement Co., 323 U.S. 173 (1945), denounced the verbatim adoption of proposed findings as "leav[ing] much to be desired," and yet insisted "they are nonetheless the findings of the District Court." 323 U.S. at 185. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) complained that such findings were "not the product of the workings of the district judge's mind," and nonetheless held that they were "formally his" and thus "not to be rejected out of hand." 376 U.S. at 656. The confusion and division among and within the courts of appeals will necessarily continue until this Court

resolves the conflicting implications of Crescent Amusement and El Paso Natural Gas by determining when if ever the adoption of findings prepared by counsel is impermissible, and by specifying what if anything the appellate courts are to do when that occurs.

III. The Decision of the Court of Appeals is Inconsistent with Pullman-Standard Co. v. Swint, 456 U.S. 273 (1982).

The briefs in the instant case were filed in the Court of Appeals in February and March, 1982. In April of 1982, this Court in Pullman-Standard Co. v. Swint, 456 U.S. 273 (1982), rejected the Fifth Circuit practice of refusing to apply to findings of "ultimate fact" the "not clearly erroneous" standard of Rule 52(a), Federal Rules of Civil Procedure.

In January, 1983, the court of appeals, apparently unaware of the decision in Pullman-Standard, premised its reversal

of the district court's finding of discrimination on the very "ultimate fact" doctrine that had been disapproved by this Court only nine months earlier. The linchpin of the Fourth Circuit's analysis was its assertion that

> the District Court['s] ... statement that "the defendant [had] engaged in a pattern and practice of discrimination ..." [is] a statement of ultimate fact ... not a finding of fact reviewable under the "clearly erroneous" rule ... . (15a)(emphasis added).

This holding is virtually identical to the Fifth Circuit distinction, condemned in Pullman-Standard, that "a finding of discrimination ... is a finding of ultimate fact." 456 U.S. at 286. The decision below expressly relied on a pre-Pullman-Standard Fifth Circuit opinion applying the discredited distinction between ultimate and subsidiary findings of fact. 15a.

In our petition for rehearing below we repeatedly referred to this Court's decision in Pullman-Standard,[21] noting that "the panel's reference to 'ultimate fact[s]' is the very concept on which the Supreme Court reversed the Fifth Circuit ...."[22] The Fourth Circuit's refusal to comply with the mandate of Pullman-Standard is neither explicable nor excusable, and warrants summary reversal by this Court.

21/ Petition for Rehearing and Suggestion for Rehearing En Banc, pp. 3, 10, 14, 21, 24, 26-28.

22/ Ibid. at 27.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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